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Signal Bleed: Congress Attacks When It Sounds Like Sex

Josh C. Grushkin

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Signal Bleed: Congress Attacks When it Sounds Like Sex

by
Josh C. Grushkin*

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When this note was slated for publication, the main case law discussed was current. In 1996, Playboy Entertainment Group, Inc. successfully received a temporary restraining order against the enforcement of section 505 of the Telecommunications Act of 1996, only to have it dissolved when their request for a preliminary injunction was denied in 1997. At that point in time, this note was written, considering the constitutionality of section 505 on the merits, and ultimately suggesting that section 505 be found unconstitutional. Once the note was completed and awaiting publication, the United States District Court for the District of Delaware fulfilled the author's prophecy, declaring section 505 unconstitutional and permanently enjoining its enforcement, in *Playboy Entertainment Group, Inc. v. United States of America*, 30 F. Supp. 2d 702 (1998). Then, on April 19, 1999, the United States filed a petition for writ of certiorari with the United States Supreme Court, which was granted on June 21, 1999 (*United States, et al. v. Playboy Entertainment Group, Inc.*, 98-1682, order list 527 U.S. ____).

Rather than drastically revise the note or scrap it entirely, COMM/ENT has opted to publish it "as is," since it accurately predicts the outcome ultimately taken by the Delaware District Court, and explores issues not fully addressed by the court in their December 1998 decision. However, COMM/ENT wishes to advise its readers that the current state of the law is no longer reflected by the case referred to in this note as "Playboy II." Furthermore, the reader should be aware that the United States Supreme Court will rule on this issue once and for all in the year 2000.

Introduction

What happens when parents come home from work to find their children watching partially distorted images and listening to crystal clear sounds of soft-core pornography on the television? If they do not subscribe to the Playboy Channel, or did not even realize that their cable provider made it available, they write a letter to their Senator to complain. In turn, the Senator introduces legislation like section 505 of the Telecommunications Act of 1996,¹ which attempts to eliminate the phenomenon of signal bleed from sexually explicit adult channels.

This note argues that section 505 of the Telecommunications Act of 1996 should ultimately be found unconstitutional. While Congress may have had good intentions, section 505 is an example of irresponsible legislation that imposes unnecessary economic burdens in an ineffective manner. Furthermore, while Congress may have identified a compelling government interest in protecting children from sexually explicit adult programming, section 505 is certainly not the least restrictive means of preserving that interest.

Part I of this note explores the inspiration behind section 505, including the phenomenon of signal bleed of cable television signals. Part II then examines the history of section 505 through both its legislative history and the two United States District Court decisions entitled *Playboy Entertainment Group, Inc. v. United States*.² Part III analyzes the merits of the constitutional challenges disposed of in the two *Playboy* decisions. Part IV then looks at alternative means of

1. 47 U.S.C. § 561 (1997). Although the law is codified as section 561 of Title 47 of the United States Code, this note will refer to the statute as "section 505 of the Telecommunications Act of 1996" or "section 505," as it is referenced in the relevant case law.

2. 918 F.Supp. 813 (D. Del. 1996), *stay dissolved*, 945 F.Supp. 772, *aff'd*, 520 U.S. 1141 (1996). The first case, 918 F.Supp. 813, in which a temporary restraining order was granted against the enforcement of section 505, will be referred to as "*Playboy I*" in this note. The subsequent case, 945 F.Supp. 772, which dissolved the TRO and denied a motion for preliminary injunction, will be referred to as "*Playboy II*."

preventing signal bleed, further emphasizing the conclusion that section 505 is not the least restrictive means of achieving Congress' goal.

Ultimately, this note proposes that section 505 be found unconstitutional and that the phenomenon of signal bleed of sexually explicit programming be addressed by Congress through other alternatives that are less constitutionally offensive.

I

Factual History

A. Background behind section 505

Shortly after President Clinton signed the Telecommunications Act of 1996 into law, Playboy Entertainment Group, Inc. sought to have section 505 declared unconstitutional, filing for injunctive relief in the United States District Court for the District of Delaware.³ Graff Pay-Per-View also filed a similar action, which was consolidated into *Playboy I*.⁴ Two days before the law was to go into effect, Playboy was granted its motion for a temporary restraining order, preventing the enforcement of section 505 until its application for a preliminary injunction could be heard.⁵ That subsequent application for a preliminary injunction was denied in *Playboy II*.⁶

Section 505 in its current codified form provides the following:

- (a) Requirement. In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such a channel or programming does not receive it.

3. See *Playboy II*, 945 F.Supp. at 772.

4. See 918 F.Supp. 813.

5. See *Playboy II*, 945 F.Supp. at 775.

6. See *id*.

(b) Implementation. Until a multichannel video programming distributor complies with the requirement set forth in subsection (a) of this section, the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

(c) Definition. As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.⁷

The *Playboy II* court refers to the "multichannel video programming distributors" as "multisystem operators" or "MSOs."⁸ The purpose behind requiring MSOs to fully scramble sexually explicit adult programming was to eliminate signal bleed.⁹

B. Signal Bleed

Signal bleed is described by the court as "the partial reception of video images and/or audio sounds on a scrambled channel."¹⁰ It occurs when an MSO scrambles the signal of a channel, but not effectively enough to make the programming on the channel completely unintelligible.¹¹ The effect of signal bleed has been described by one commentator as giving "unsuspecting channel surfers two or three seconds of flesh and groans before the screen goes quiet and squiggly."¹² This occurs because of a phenomenon called random lockup, in which a scrambled signal may occasionally appear clear for a moment before the visual image is scrambled again.¹³ In *Playboy I*, the court inferred from the record evidence "that the content of the audio signal that may be heard is akin to the utterances of actress Meg Ryan during

7. 47 U.S.C. § 561 (1997).

8. *Playboy II*, 945 F.Supp. at 776.

9. *See id.*

10. *Id.*

11. *See id.* at 778.

12. Henry Goldblatt, *Playboy's Complaint*, FORTUNE, Oct. 27, 1997, at 264.

13. *See Playboy II*, 945 F.Supp. at 778.

her performance in the diner scene in the movie 'When Harry Met Sally.'"¹⁴

The *Playboy II* court found that "the severity of this signal bleeding problem varies from time to time and from place to place. The reason for these inconsistencies may be weather extremes, faulty or old equipment, or human error in installing, operating, and/or maintaining systems."¹⁵ The technology available to consumers also plays a role in the prominence of signal bleed. Older, non-cable ready televisions require converter boxes in order to enable the cable subscriber to view more than the traditional VHF and UHF channels.¹⁶ Some generations of converter boxes have a feature called channel mapping, which prevents signal bleed by not allowing the box to tune in any signal at all on a scrambled channel.¹⁷

Cable-ready televisions do not require a converter box, as they are able to receive the multitude of channels an MSO may provide.¹⁸ However, the most modern of the cable-ready televisions are so advanced, they can "make a discernible picture out of a partly-scrambled signal."¹⁹ The *Playboy II* court recognized the potential results that could come from signal bleed. "With this incidence of improved technology and/or partially scrambled signals, a non-subscriber may see and hear portions of a channel or program to which he or she does not subscribe. This result is of particular concern when the programming is sexually explicit, intended for an adult-only audience."²⁰

Similar concerns prompted Senator Diane Feinstein, a California Democrat, and Senator Trent Lott, the current Majority Leader from Mississippi, to introduce Amendment No. 1269 to the Telecommunications Act of 1996.²¹ Titled "Scrambling of Sexually Explicit Adult Video Service

14. 918 F.Supp. at 822 n.11.

15. 945 F.Supp. at 778.

16. *See id.* at 777 & n.11.

17. *See id.* at 778 & n.14.

18. *See id.* at 777 & n.11.

19. *Id.* at 778.

20. *Id.*

21. *See* 141 CONG. REC. S8134—01, S8166 (1995).

Programming,” the amendment emerged when the Senators heard that parents were coming home from work to find their children watching or listening to the adults-only channels instead of watching cartoons.²² In *Playboy II*, anecdotal evidence of such events included letters sent to other members of Congress and affidavits from several parents testifying about the signal bleed in their homes, and about their children being exposed to signal bleed when they visit their friends’ homes.²³ Also admitted into evidence were video and audio tape recordings made by non-subscribers of the signal bleed from both the Playboy Channel and the Spice Channel, which the court described as showing “partially scrambled images of a nude woman caressing herself” and “sounds of what appear to be repeated sexual encounters accompanied by assorted orgiastic moans and groans,” respectively.²⁴ There was, however, no concrete determination made as to the precise number of occurrences or households that are subjected to signal bleed.²⁵

C. Cable Television

There are over fifty MSOs nationally, but the most prominent are Tele-Communications, Inc. (TCI) and Time Warner.²⁶ Each provider offers its subscribers various packages of channels at varying monthly fees.²⁷ The least expensive is a basic cable package, which usually includes locally broadcast network channels, such as ABC, NBC, CBS, Fox, WB, and UPN, in addition to public access channels, news networks, and channels devoted to sports, music videos, shopping, and education.²⁸ MSOs also provide premium channels, which may be packaged or available in addition to the basic package, always entailing an additional monthly

22. *Id.*

23. *See* 945 F.Supp. at 778.

24. *Id.*

25. *See id.* at 779 & n.16.

26. *See* DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES, 631 (3d ed. 1996 & Supp. 1997).

27. *See Playboy II*, 945 F.Supp. at 776.

28. *See id.*

fee.²⁹ Premium channels include HBO, Cinemax, Showtime, and the Movie Channel, which program recently released motion pictures.³⁰ Also considered premium channels are the Playboy Channel and AdultTVision, both owned by the Playboy Entertainment Group; and Adam & Eve and Spice, both owned by Graff Pay-Per-View.³¹ Since all four channels program virtually 100% sexually explicit adult programming,³² it is the signal bleed from channels like these that section 505 was designed to block.³³

Some MSOs also offer premium programming on a pay-per-view basis, in which the consumer places an order with the MSO to receive access to a particular movie, program, or sporting event for an additional fee.³⁴ The MSO then, by remote, temporarily unscrambles the signal of the channel the pay-per-view program appears on at the scheduled time, and then rescrambles the signal upon the conclusion of the program.³⁵ These scrambled signals also create the potential for signal bleed. Both Playboy and Graff provide sexually explicit pay-per-view programming.³⁶

The channels that MSOs provide to their subscribers originate from signals sent out by programmers via satellite, master antennas, and local broadcast television stations.³⁷ Coaxial cable then carries the channels from the MSOs' system transmitter to subscribers' homes, where the coaxial cable is connected to either a cable-ready television, or to a converter box, which in turn is connected to the television.³⁸ Since the MSOs charge additional fees for premium channels and pay-per-view programming, such signals are scrambled by the MSOs in order to prevent non-subscribers from viewing

29. *See id.*

30. *See id.*

31. *See id.* at 777.

32. *See id.*

33. *See* 141 CONG. REC. S8134— 01, S8167 (1995).

34. *See Playboy II*, 945 F.Supp. at 776.

35. *See id.*

36. *See id.* at 777.

37. *See id.*

38. *See id.*

them.³⁹ This is accomplished through “RF” technology, which scrambles only the visual portion of the signal, or through “baseband” technology, which scrambles both the visual and audio signals.⁴⁰

In order to ensure that a non-subscriber does not receive a premium channel’s signal, MSOs can use either “positive trapping” or “negative trapping.”⁴¹ A positive trap is a metal cylinder that a subscriber to a premium channel would attach to his television in order to unscramble the premium channel.⁴² This requires the MSO to scramble that channel at its system transmitter, meaning that all non-subscribers will receive the channel in its scrambled form.⁴³ A negative trap works conversely, with the MSO sending the premium channel out to all homes unscrambled, and then installing the negative trap on non-subscribers’ televisions in order to scramble the premium channel in their homes.⁴⁴ The *Playboy II* court recognized that while MSOs have a choice of method to use, positive trapping is usually more cost effective when the majority of homes do not subscribe to the premium channel.⁴⁵

In 1996, the Playboy Channel was available as a pay-per-view channel to 11.2 million homes, an increase from the prior year by 200,000.⁴⁶ However, 400,000 homes were given new access to the channel on a 24-hour per day basis, bringing the total of such households to 4.5 million, some of which overlap with the 11.2 million pay-per-view homes.⁴⁷ By 1997, Playboy cable programming was available to approximately 21 million households, with about 5 million of those households receiving the programming from direct broadcast satellite services.⁴⁸ Taking into account income from cable and direct

39. See *id.*

40. See *Playboy II*, 945 F.Supp. at 777.

41. See *id.* at 778.

42. See *id.*

43. See *id.*

44. See *id.*

45. See *Playboy II*, 945 F.Supp. at 778.

46. See Gene G. Marcial, *Why Playboy is Hot Again*, BUSINESS WEEK, Feb. 24, 1997, at 122.

47. See *id.*

48. See Brooks Boliek, *Playboy: Net's freedom should apply to cable*, THE

broadcast satellite services, financial analysts found the Playboy Channel's income on the upswing, doubling from \$9 million in 1996 to perhaps \$20 million in 1998.⁴⁹

The *Playboy II* court's findings indicate that of all the homes to which the programming is made available, three million households subscribe to and/or purchase pay-per-view sexually explicit adult programming.⁵⁰ The court determined that of the approximately 62 million homes that receive cable in the United States, 20 to 25 million have the converter boxes that use channel mapping to eliminate the possibility of signal bleed.⁵¹ However, the court was unable to determine how many of the remaining 40 million households would be subject to signal bleed, due to the fact that there would be no signal bleed where the MSOs already effectively scramble their premium channels, or where the households actually subscribe to the premium channels.⁵² Since this action was at the preliminary injunction stage, the court stated, "[i]f at the trial on the permanent injunction more specific evidence of the number of households with potential for signal bleed were to be presented, we would be in a better position to consider whether the standards for a permanent injunction have been met."⁵³

It is also necessary to consider that sexually explicit adult programs also appear on other premium channels which are not primarily devoted to programming 100% adult content.⁵⁴ Evidence received by the *Playboy II* court indicated that on a Friday evening, one-sixteenth the number of such programs available on the sexually explicit channels was also available on non-sexually explicit channels.⁵⁵ The court also noted that the R-rated movies shown on the non-sexually explicit channels "contained some sexually explicit scenes but were

HOLLYWOOD REPORTER, July 24, 1997.

49. *See id.*

50. *See Playboy II*, 945 F.Supp. at 777.

51. *See id.* at 779.

52. *See id.*

53. *Id.* at 779 n.16.

54. *See id.* at 777.

55. *See id.*

not continuously sexually explicit” as are the programs on the Playboy Channel and Spice.⁵⁶

II

Legislative History and Case Law

A. Section 505

In order to comply with section 505, MSOs that do not currently effectively scramble their sexually explicit adult programming channels have two alternatives. Section 505(a) provides the first, mandating that such channels be scrambled “so that the programming cannot be viewed or heard in an understandable manner.”⁵⁷ The second alternative, contained within section 505(b), requires that until the MSO complies with section 505(a), it shall not provide “such programming during the hours of the day when . . . a significant number of children are likely to view it,”⁵⁸ a practice commonly known as time channeling.⁵⁹ The Federal Communications Commission set that period to be from 10:00 p.m. to 6:00 a.m.⁶⁰

The requirement set forth in section 505(a), dubbed “complete scrambling” by the *Playboy II* court,⁶¹ can be fulfilled by MSOs in a number of ways.⁶² One is to provide nonsubscribers with a lockbox.⁶³ A lockbox allows both the audio and video portions of the signal to be fully scrambled when the subscriber chooses.⁶⁴ For example, when parents do not want their children viewing a certain channel, they may turn and remove the key from the lockbox, blocking that channel’s signal until the parent uses the key to unlock it. The court found that because most lockboxes are only capable of blocking signals to the television set to which the lockbox is

56. *Playboy II*, 945 at 777.

57. 47 U.S.C. § 561(a), (c) (1997).

58. 47 U.S.C. § 561(b).

59. *See Playboy II*, 945 F.Supp. at 774.

60. *See id.*

61. *Id.* at 780.

62. *See id.*

63. *See id.* at 781.

64. *See id.*

attached, each television set connected to cable would need to have a lockbox attached in order to bring that MSO under compliance with section 505(a).⁶⁵ Lockboxes also are only effective when used with a converter box that features channel mapping.⁶⁶ Therefore, the cost per household for an MSO to distribute a lockbox and converter box to all nonsubscribers would be approximately \$115.⁶⁷ The *Playboy II* court described the total cost as “prohibitive, probably in excess of one billion dollars.”⁶⁸

Another way MSOs can completely scramble their sexually explicit channels is by providing negative traps to nonsubscribers.⁶⁹ As described earlier, attaching a negative trap to a nonsubscriber’s television acts to scramble the signal that is sent out by the MSO unscrambled.⁷⁰ While the cost per household would be around \$15, the court noted that using negative traps would be “an economically feasible solution only in areas, such as military bases, where a large majority of cable subscribers want to receive the adult channel.”⁷¹

A third alternative is to use positive traps to achieve “double scrambling.”⁷² In addition to the traditional RF or baseband scrambling, the signal of the adult channel would be completely jammed by the MSO, so that no signal bleed would occur in any cable subscriber’s home.⁷³ Then, subscribers to the adult channel are provided with a converter box and a positive trap, which act together to unscramble the RF or baseband scrambling and the jamming signal, respectively.⁷⁴ The *Playboy II* court favored this method as “the most workable,” as the positive traps average \$7 per television and the additional jamming equipment would cost the MSO

65. See *Playboy II*, 945 at 781.

66. See *id.*

67. See *id.*

68. *Id.*

69. See *id.*

70. See *id.*

71. *Playboy II*, 945 at 781.

72. *Id.*

73. See *id.*

74. See *id.*

approximately \$750 to \$1000.⁷⁵ However, while the court noted that the positive trap can either be installed by the subscriber for free or installed by the MSO for around \$35, it failed to consider the additional cost of providing the converter boxes.⁷⁶

While the positive trap alternative may be the most cost-effective, it also has its share of drawbacks. For example, pay-per-view purchases are traditionally spontaneous, where the viewer orders the program shortly before it begins.⁷⁷ If the positive trap alternative was used by the MSO, a subscriber would have to pick up or order the positive trap well in advance of viewing the program, impinging upon the spontaneity normally associated with watching such programs.⁷⁸ In *Playboy II*, the plaintiffs claimed that their revenues had dropped by 50% for the MSOs who already use positive traps to scramble adult programming, suggesting that "the impulse nature of purchasing adult programming" was a significant factor in the loss of revenue.⁷⁹

If an MSO does not wish to adopt any of the above alternatives, it may choose instead to comply with section 505(b), the time channeling requirement.⁸⁰ The FCC set the safe harbor period for sexually explicit adult programming between the hours of 10:00 p.m. and 6:00 a.m.⁸¹ Essentially, for an MSO to comply with section 505(b), it would only be able to make the sexually explicit adult channels available during that eight-hour period.

B. *Playboy I and II*

In March 1996, the United States District Court for the District of Delaware, in *Playboy I*, granted a temporary

75. *See id.*

76. *See id.*

77. *See Playboy II*, 945 at 781.

78. *See id.*

79. *Id.* at 782.

80. *See* 47 U.S.C. § 561(b) (1997).

81. *See* In re Implementation of Section 505 of the Telecommunications Act of 1996, CS Dkt. No. 96-40, FCC 96-84, Order & Notice of Proposed Rulemaking amending 47 C.F.R. § 76 ¶ 6 (released March 5, 1996; intended to become effective March 9, 1996).

restraining order preventing the United States from implementing or enforcing section 505.⁸² The temporary restraining order was then dissolved in *Playboy II*, which denied Playboy's and Graff's applications for a preliminary injunction.⁸³ In denying the preliminary injunction, the court considered whether the plaintiffs (1) would be likely to succeed on the merits, (2) whether they will suffer irreparable harm if not granted relief, (3) if that harm would be outweighed by any harm that may result to the defendants if the injunctive relief is granted, and (4) whether the injunctive relief is in the public interest.⁸⁴ Those four factors were also considered by the *Playboy I* court, which granted the plaintiffs the temporary restraining order preventing the enforcement of section 505.⁸⁵

Playboy and Graff challenged the constitutionality of section 505 with three claims: violation of the First Amendment freedom of speech; violation the Fourteenth Amendment Equal Protection Clause; and void-for-vagueness.⁸⁶ In *Playboy I*, strict scrutiny was applied in considering whether the case would succeed on the merits, with the court framing the review as whether or not section 505 "represents the least restrictive means of achieving the Government's interest . . . to ensure that minors do not have access to non-subscribed adult programming on cable television."⁸⁷ Referring to *Sable Communications of California, Inc. v. FCC*,⁸⁸ the court indicated that indecent speech, such as the sexually explicit programming targeted by section 505, may be regulated by the Government "in order to promote a compelling interest if it chooses the least restrictive means to

82. See 918 F.Supp. 813 (D. Del. 1996), *stay dissolved*, 945 F.Supp. 772, *aff'd*, 520 U.S. 1141.

83. See 945 F.Supp. 772 (D. Del. 1996).

84. See *id.* at 783 (citing *American Civil Liberties Union v. Reno*, 929 F.Supp. 824, 851 (E.D.Pa. 1996)).

85. See *Playboy I*, 918 F.Supp. at 820.

86. See *Playboy II*, 945 F.Supp. at 774-75. The merits of the free speech and equal protection claims will be further discussed in the Part III, *infra*. The vagueness challenge will not be considered since the author agrees with the *Playboy II* court that Playboy has "little-to-no chance of succeeding on the merits of a vagueness claim." 945 F.Supp. at 791.

87. 918 F.Supp. at 820.

88. 492 U.S. 115 (1989).

further the articulated interest.”⁸⁹ In *Sable*, the United States Supreme Court recognized that “protecting the physical and psychological well-being of minors” is a compelling government interest.⁹⁰ The Supreme Court also emphasized that the means designed to achieve such compelling interests must be narrowly tailored.⁹¹

1. Free Speech

The *Playboy I* court concluded that there was serious doubt as to whether section 505 was the least restrictive means to address the government’s interest, and thus found that a likelihood of success on the merits had been demonstrated by the plaintiffs.⁹² The main reason for the court’s doubt that section 505 was not the least restrictive means was its opinion that alternative technologies should be further investigated before implementing the law.⁹³ Those investigations were supposedly accomplished in *Playboy II*, where the court concluded that the plaintiffs failed to demonstrate a likelihood of success if any of their claims were litigated on the merits.⁹⁴

The court’s change of heart between *Playboy I* and *Playboy II* was inspired in large part by the United States Supreme Court’s ruling in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* (hereinafter “*Denver Consortium*”).⁹⁵ The statutory provisions at issue in *Denver Consortium* sought to regulate sex-related material broadcast on cable channels that fell into the categories of “leased access channels” and “public, educational, or governmental channels.”⁹⁶ The *Playboy*

89. *Id.* at 126.

90. *Id.*

91. *See id.*

92. *See* 918 F.Supp. at 821.

93. *See id.* The alternative technologies investigated in *Playboy II* included lockboxes, double-scrambling using positive traps, and negative trapping. *See* discussion *supra* Part II.A.

94. *See* 945 F.Supp. at 783.

95. 518 U.S. 727 (1996).

96. *Denver Consortium* involved challenges to the sections 10(a), 10(b), and 10(c) of the Cable Act of 1992. *See id.* at 732. Section 10(a) “permits a cable operator to enforce prospectively a written and published policy of prohibiting

II court pointed out the contrast between the types of channels dealt with in *Denver Consortium* and in the *Playboy* cases, noting that, “[u]nlike leased and public access channels, the Graff and Playboy networks are commercial premium channels.”⁹⁷

In *Denver Consortium*, the Supreme Court found section 10(b) of the Cable Act of 1992 unconstitutional, while a plurality found sections 10(a) and 10(c) valid.⁹⁸ However, most relevant to the court in *Playboy II* was the commentary gleaned from *Denver Consortium* concerning the level of scrutiny to be applied to such challenges, as the *Playboy II* court decided that it “should apply either strict scrutiny or something very close to strict scrutiny.”⁹⁹ This decision was based on the *Playboy II* court’s interpretation of Justice Breyer’s statement in *Denver Consortium* in which he summed up the Supreme Court’s history of First Amendment jurisprudence by saying, “Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required.”¹⁰⁰ The *Playboy II* court also decided that section 505 should be treated as a content-based restriction on speech, since Congress intended it to apply only to signal bleed of sexually explicit programming.¹⁰¹

In addition, the *Playboy II* court decided to take into account the context of the sexually explicit content, noting

programming that the operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards,” while section 10(b) requires MSOs that do not ban sexually explicit programming under section 10(a) to instead completely segregate and block the signal carrying such programming. Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1486, §§ 10(a),(b) (1999). Section 10(c) is similar to section 10(a), except that it applies to public, educational, or government channels, as opposed to the leased access channels targeted by section 10(a). *See id.* at § 10(c).

97. 945 F.Supp. at 784 n.23.

98. *See* 518 U.S. at 733

99. 945 F.Supp. at 784.

100. *Id.* at 785 (quoting *Denver Consortium*, 518 U.S. at 740). Despite the fact that *Denver Consortium* overturned a cable regulation, the *Playboy II* court used the Supreme Court’s discussion of applicable scrutiny levels in *Denver Consortium* to uphold the cable regulations of section 505.

101. *See id.*

that the Supreme Court has found cable television to be as accessible to children as over-the-air broadcasting, if not more so.¹⁰² This finding contributed to the *Playboy II* court's determination that protecting children from sexually explicit material is a compelling government interest, a conclusion which was not disputed by any party in the suit.¹⁰³ The *Playboy II* court then concluded that the plaintiffs had failed to show that they would be likely to succeed on the merits of their free speech claim, based on the conclusion that section 505 "is an acceptable governmental response intended to prevent exposure of minors to sexually explicit programming."¹⁰⁴ However, an "acceptable response" is different from the "least restrictive means," and thus the *Playboy II* court may have reached the wrong conclusion.

2. Equal Protection

Likewise, the court in *Playboy II* was also not persuaded that the plaintiffs' equal protection claim would succeed on the merits.¹⁰⁵ Playboy and Graff claimed that section 505 denied them equal protection of the law because it is directed only at channels which program 100% sexually explicit programming, thus allowing other premium channels, like HBO and Showtime, to program the same sexually explicit programming, so long as it is mixed in with non-sexually explicit programming.¹⁰⁶ In stating that "[t]he cause of the problem was primarily traced to sex-dedicated networks and, understandably, Congress began its efforts to address the problem by focusing on those networks," the *Playboy II* court concluded that there was no violation of the Equal Protection Clause.¹⁰⁷ Because the government's discrimination in section 505 does not involve a suspect class, the *Playboy II* court used

102. See *id.* (citing *Denver Consortium*, 518 U.S. at 744).

103. See *id.* at 788.

104. *Id.* at 790.

105. See *Playboy II*, 945 at 790.

106. See *id.*

107. *Id.* at 791.

the permissive rational basis scrutiny in considering Playboy's equal protection claim.¹⁰⁸

In regard to whether irreparable harm would be suffered by Playboy and Graff if injunctive relief was denied, the *Playboy I* court noted that "the requisite harm is established where the plaintiff shows that an act of Congress has 'a chilling effect on free expression.'"¹⁰⁹ The *Playboy II* court, however, never specifically addressed the irreparable harm consideration, since it felt that if the only irreparable harm suffered by plaintiffs would be the loss of First Amendment freedoms, a finding that section 505 did not violate those freedoms meant irreparable harms need not be considered.¹¹⁰

The *Playboy I* court decided that if the temporary restraining order was not granted, practically all MSOs affected by section 505 would be forced to comply with section 505(b), the time channeling alternative.¹¹¹ This was due to a combination of the costs involved with complying with the complete scrambling requirement, as well as the additional labor time such compliance would require.¹¹² Acknowledging that the FCC had set the time channeling period between 10:00 p.m. and 6:00 a.m., the *Playboy I* court stated that "such a substantial reduction of viewing time will cause significant financial losses for both the cable companies and Playboy."¹¹³

The *Playboy I* court also found that the United States had failed to demonstrate that it would suffer irreparable harm if the relief is granted.¹¹⁴ The court stated that "there is an absolute void of legislative findings that section 505 is necessary to protect minors from exposure to sexually oriented material shown on adult cable channels which their

108. See *id.* at 791 n.31.

109. *Playboy I*, 918 F.Supp. at 821 (citing *American Civil Liberties Union v. Reno*, 929 F.Supp. 824 (E.D.Pa. 1996)).

110. See 945 F.Supp. at 783.

111. See 918 F.Supp. at 821.

112. See *id.*

113. *Id.*

114. See *id.* at 821-22.

parents have chosen not to subscribe to.”¹¹⁵ Specifically, the *Playboy I* court noted that “the legislative record contains no findings as to how often this bleeding occurs, how many minors are exposed to the adult programming when the bleeding occurs or what effect such exposure has on minors.”¹¹⁶ Thus, in weighing the irreparable harm on both sides, the *Playboy I* court concluded that the potential harm to the plaintiffs substantially outweighed any harm the defendants would suffer if temporary injunctive relief was not granted.¹¹⁷

As for the impact upon the public interest, the *Playboy I* court concluded that granting a temporary injunction would simply maintain the status quo, and thus would not harm the public interest.¹¹⁸ Again, *Playboy II* never reached this consideration, as it quit its analysis once it decided the free speech claim lacked a likelihood of success.¹¹⁹

C. Other Legislation

There are two other statutes which are also designed to completely block the signals from undesired cable channels: 1) section 544(d) of the 1984 Cable Act,¹²⁰ and 2) section 504 of the Telecommunications Act of 1996.¹²¹

Section 544(d) of the 1984 Cable Act provides, in pertinent part, the following:

- (2) In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.
- (3)(A) If a cable operator provides a premium channel without charge to cable subscribers who do not subscribe to

115. *Id.* at 822.

116. *Id.*

117. *See Playboy I*, 918 F.Supp. at 822.

118. *See id.*

119. *See Playboy II*, 945 F.Supp. at 108.

120. 47 U.S.C. § 544(d)(2)(A) (1997).

121. 47 U.S.C. § 560 (1998). Although the law is codified as section 560 of Title 47 of the United States Code, this note will refer to the statute as “Section 504 of the Telecommunications Act of 1996” or “section 504,” as it is referenced in the relevant case law.

such premium channel, the cable operator shall, not later than 30 days before such premium channel is provided without charge—

- (i) notify all cable subscribers that the cable operator plans to provide a premium channel without charge;
- (ii) notify all cable subscribers when the cable operator plans to offer a premium channel without charge;
- (iii) notify all cable subscribers that they have a right to request that the channel carrying the premium channel be blocked; and
- (iv) block the channel carrying the premium channel upon the request of a subscriber.¹²²

Clearly, section 544(d)(2) was designed to accomplish the same task as section 505, but in a much less restrictive manner. Furthermore, Subsections 544(d)(3)(A)(i)-(iv) could easily be construed to apply to not only the providing of a premium channel free of charge, but also to the signal bleed of such a channel.

Section 504 of the Telecommunications Act of 1996 provides, “(a) SUBSCRIBER REQUEST. -- Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.”¹²³ In *Playboy II*, the court articulated that “[t]he main difference is that under section 504 the household has to request the box, while under section 505 the MSO must provide the box.”¹²⁴ In a footnote following that statement, the court noted that elsewhere in the Telecommunications Act, Congress identifies “a compelling government interest in empowering parents to control the television viewing by their children” by providing them with the ability to voluntarily block programming they believe their children should not watch, as section 504 seeks to do.¹²⁵

However, the *Playboy II* court went on to characterize section 504 as “an adjunct of lesser efficacy because its

122. 47 U.S.C. § 540.

123. Pub. L. No. 104-104, § 504, 110 Stat. 56, 136 (1996).

124. 945 F.Supp. at 789.

125. *Id.* at 789 n.28.

exercise requires knowledge and the taking of affirmative steps such as requesting the blocking device from the MSO.”¹²⁶ The *Playboy II* court’s main problem with section 504 was the lack of evidence that parents were aware that section 504 afforded them the opportunity to have undesired channels blocked at no additional cost.¹²⁷ It was in turn pointed out by the court that there was a lack of evidence that MSOs or providers like Playboy were advertising the availability of such boxes.¹²⁸

III

Constitutional Analysis

A. Free Speech

The treatment of the free speech claim in *Playboy II* was cursory at best. While the court put forth effort in determining that the level of scrutiny should be “something very close to strict,”¹²⁹ and that protecting children from sexually explicit programming was a compelling government interest,¹³⁰ the *Playboy II* court did not do an adequate job of determining whether section 505 was “carefully tailored to serve” the compelling government interest, as it stated it would.¹³¹

Instead of first addressing whether the complete scrambling provision of section 505(a) was narrowly tailored, the *Playboy II* court acknowledged that “[t]here is undoubtedly a substantial expense in complying with subsection (a).”¹³² However, it quickly dismissed those economic concerns by stating, “economics alone cannot dictate the result where constitutional rights are at issue.”¹³³ The *Playboy II* court then determined that even if the expenses incurred in complying with section 505(a) would make it unconstitutional, that

126. *Id.*

127. *See id.* at 789.

128. *See id.*

129. *Id.* at 784.

130. *See Playboy II*, 945 at 786.

131. *Id.* at 787.

132. *Id.* at 788.

133. *Id.* (quoting *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 78 (1976)(Powell, J., concurring)).

should not matter because the alternative, section 505(b)'s time-channeling, was found to be constitutional.¹³⁴ However, there is arguably a flaw in the court's conclusion that, "if the time-channeling alternative provides a constitutional means of compliance with section 505, then section 505 is constitutional."¹³⁵

The main problem arises with the *Playboy II* court's justification of the time-channeling provision in section 505(b) by relying on the Supreme Court's holding in *FCC v. Pacifica Foundation*.¹³⁶ In *Playboy II*, the court states, "[b]ecause the Supreme Court endorsed a time-channeling solution [in very similar circumstances] in *Pacifica Foundation*, we believe that time-channeling also survives constitutional scrutiny here."¹³⁷ However, the circumstances in the *Pacifica* case are distinguishable from the situation surrounding section 505.

First of all, the time-channeling requirement in *Pacifica* applied to a radio broadcast of patently offensive material,¹³⁸ which is distinguishable from the distribution of a cable signal of sexually explicit programming. One distinction is that radio signals travel through the airwaves, allowing anyone with a radio to receive the programming,¹³⁹ whereas the signal bleed addressed in section 505 is only available to those households which subscribe to an MSO that carries sexually explicit adult premium channels.¹⁴⁰ The patently offensive speech in *Pacifica*, George Carlin's "Filthy Words" monologue,¹⁴¹ could be heard by anyone with a functioning radio within *Pacifica Foundation's* broadcast area. That includes individuals listening at home, at

134. See *id.*

135. *Id.*

136. 438 U.S. 726 (1978).

137. *Playboy II*, 945 F.Supp. at 789.

138. See *Pacifica*, 438 U.S. at 729.

139. See *id.* at 731.

140. See *Playboy II*, 945 F.Supp. at 774.

141. The patently offensive speech in *Pacifica* was satiric humorist George Carlin's 12 minute monologue entitled "Filthy Words," in which he refers to his thoughts about seven words usually not allowed to be said over the airwaves. See 438 U.S. at 729. On October 30, 1973 at approximately 2 p.m., it was broadcast by a New York radio owned by *Pacifica Foundation*, and was heard by a man driving in his car with his young son, who later filed a complaint with the FCC that culminated in the Supreme Court's decision in *Pacifica*. See *id.*

work, or even in an automobile, as was the individual who filed the original complaint with the FCC that led to the *Pacifica* decision.¹⁴² Thus, a very large portion of the 272 million people in the United States¹⁴³ could potentially access such broadcasts, since it is estimated that there are over 540 million functioning radios in the United States.¹⁴⁴

In contrast, the signal bleed from the sexually explicit programming that is targeted by section 505 can only be received by less than 40 million households.¹⁴⁵ Therefore, it is reasonable to conclude that the Supreme Court's decision to allow time-channeling in *Pacifica* is distinguishable from the *Playboy II* court approving of the time-channeling alternative in section 505(b). Had *Pacifica* involved a much more limited number of potential unwanted exposures, as is the case with signal bleed, the Supreme Court may have decided not to endorse time-channeling. Furthermore, the majority opinion in *Pacifica* was criticized by Justice Brennan who wrote, "it ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many—including the FCC and this Court—might find offensive."¹⁴⁶ Similarly, the *Playboy II* court failed to adequately take into account the impact section 505 has on the rights of providers of and subscribers to sexually explicit adult programming.

The Supreme Court in *Pacifica* also emphasized the narrowness of its holding, as Justice Stevens' opinion for the Court indicated that time of day, content of the program, and the differences between radio and television are all relevant variables when considering time-channeling under the rationale of nuisance.¹⁴⁷ Yet, the *Playboy II* court concluded

142. See *id.* at 730.

143. See U.S. BUREAU OF THE CENSUS, *Monthly estimates of the United States Population* (last modified June 4, 1999) available at <<http://www.census.gov/population/estimates/nation/intfile1-1.txt>>, (last visited June 14, 1999).

144. CENTRAL INTELLIGENCE AGENCY, *CIA WORLD FACT BOOK 1996*, (1992 estimated number of radios) available at <<http://www.odci.gov/cia/publications/nsolo/factbook/us.htm>> (last visited Nov. 2, 1998)

145. See *Playboy II*, 945 F.Supp. at 779.

146. 438 U.S. at 764 (Brennan, J., dissenting)

147. See 438 U.S. at 750.

that, compared to the thought of a child hearing Carlin's filthy words in *Pacifica*, the idea of a child being exposed to the sights and sounds of sexually explicit programming via signal bleed was "even more troublesome."¹⁴⁸ Yet, no deference was given to contrasts between the two cases in terms of the numbers of potential children involved or the innate differences between a free radio broadcast and subscription-based cable signal bleed.

Furthermore, it seems irresponsible for the *Playboy II* court to uphold section 505 simply because it feels at least half of it is constitutional. The court actually stated that "even if section 505(a) does not pass constitutional analysis, section 505(b) does."¹⁴⁹ In the context of a hearing for a preliminary injunction, perhaps such analysis is allowable. But if this issue was truly being decided on its merits, that holding appears to be more of a cop-out than a conclusion of law.

Instead of making the flawed conclusion that the plaintiffs were unlikely to succeed on the merits of their free speech claim, the *Playboy II* court should have followed something closer to the decision in *Playboy I*. In that decision, the court heeded the argument that there were substantially less restrictive means available to serve the government's compelling interest.¹⁵⁰ While the court in *Playboy II* supposedly followed the suggestion of the *Playboy I* court by exploring these alternative means before concluding whether section 505 was constitutional, it appears that the *Playboy II* decision ignored its record of evidence and instead relied on *Pacifica* to justify section 505(b) and then, in turn, relied on section 505(b) to justify section 505(a). It seems apt to conclude, as the *Playboy I* court stated, "[b]ecause of the obvious importance of First Amendment guarantees, . . . further investigation is needed to properly examine the Playboy programming and the feasibility of using alternative technologies prior to permitting the implementation of section

148. 945 F.Supp. at 788.

149. *Id.* at 789.

150. *See Playboy I*, 918 F.Supp. at 821.

505.”¹⁵¹ Since the *Playboy II* court failed in that task, such an investigation takes place in Part IV of this note.

B. Equal Protection

The *Playboy II* court’s essential argument against finding a violation of equal protection relied upon the Supreme Court’s treatment of a similar challenge in *Denver Consortium*.¹⁵² In *Denver Consortium*, Justice Breyer wrote for the majority that, “Congress need not deal with every problem at once.”¹⁵³ In support of this statement, Justice Breyer cited *Semler v. Oregon Bd. Of Dental Examiners*,¹⁵⁴ which stood for the principle that Congress need not “strike at all the evils at the same time.”¹⁵⁵ In turn, the *Playboy II* court cited *Williamson v. Lee Optical of Okla.*,¹⁵⁶ which is famous for contributing the “one step at a time” doctrine,¹⁵⁷ and *United States v. Edge Broadcasting Co.*,¹⁵⁸ in which the Supreme Court decided that it could not “require that the Government make progress on every front before it can make progress on any front.”¹⁵⁹ However, while all these cases support the idea that statutes which target only some of the causes of a compelling government interest can be valid under the Equal Protection Clause of the Fourteenth Amendment, section 505 is distinguishable from the scenarios in those cases.

For section 505 not to violate *Playboy*’s and *Graff*’s equal protection rights, the statute would need to cover all premium channels that program any sexually explicit adult programming, regardless of the ratio of such programming to non-sexually explicit programming. In other words, section 505 would not violate the Equal Protection Clause if it simply required the signal bleed from all premium channels to be

151. *Id.*

152. 945 F.Supp. at 790.

153. *Denver Consortium*, 518 U.S. at 757.

154. 294 U.S. 608, 610 (1935).

155. *Id.*

156. 348 U.S. 483, 489 (1955).

157. *Id.*

158. 509 U.S. 418, 434 (1993).

159. *Id.*, cited in *Playboy II*, 945 at 791.

blocked, instead of the signal bleed of only the adult channels. There is also no technical reason for limiting the regulation of section 505 to only sexually explicit channels, as the technology necessary to block all premium channels is the same that would be used block only the adult channels.

In contrast, *Semler* addressed a statute that regulated misleading advertising among dentists, which *Semler* challenged as an equal protection violation because it did not extend to the regulation of misleading advertising by other professionals.¹⁶⁰ The Court found that there was no violation, as the Oregon legislature was permitted to deal with different professions individually.¹⁶¹ Likewise, in *Lee Optical*, the Supreme Court allowed the Oklahoma legislature to address the problem of consumers obtaining eye glasses without first obtaining a prescription from an optometrist by prohibiting opticians from making the glasses without receiving a prescription.¹⁶² When it was argued by the opticians that drugstores and other sellers of “ready-to-wear” eyeglasses were not being prohibited from supplying eyeglasses without prescriptions, the Court reasoned that the legislature “may take one step at a time” in addressing the problem.¹⁶³

The difference between those cases and the equal protection claim brought by *Playboy* and *Graff* is that applying section 505 to all premium channels is much simpler than trying to regulate the advertising of all professionals or pass a law that targets opticians and all other suppliers of eyeglasses. If addressing the problems in *Semler* and *Lee Optical* were as easy as it would be to block the signal bleed of all premium channels, then the *Playboy II* court’s conclusion that there is no violation of equal protection would be strengthened. However, it appears that, at the minimum, *Playboy* and *Graff* were capable of showing that they may be able to succeed on the merits of their equal protection claim.

160. See 294 U.S. at 610.

161. See *id.* at 610-11.

162. See 348 U.S. at 489.

163. *Id.*

IV

Alternatives and Further Analysis

A. *Denver Consortium* Construed Differently

Since the *Playboy II* court put such great emphasis on the Supreme Court's decision in *Denver Consortium*, it is interesting that *Denver Consortium* also provides support by analogy for the notion that the impact on the spontaneity of pay-per-view purchases of sexually explicit adult programs may lead to a loss of revenue if positive traps are used by MSOs to comply with section 505. In *Denver Consortium*, the Supreme Court acknowledged that a provision which required an MSO to unblock a specific channel upon the subscriber's written request, and then reblock the channel also upon written request, would mean "that a subscriber cannot decide to watch a single program without considerable advance planning" and that programmers would be prevented "from broadcasting to viewers who select programs day by day (or, through 'surfing,' minute by minute)."¹⁶⁴ While section 505 is admittedly distinguishable, the Supreme Court felt that the restrictions found in the provision in *Denver Consortium* supported a finding that the provision was unconstitutional, as it was not the least restrictive means for the government to meet its compelling interest.¹⁶⁵ That same argument can also be applied to section 505, since the use of positive traps was suggested by the *Playboy II* court as the most feasible means of compliance.¹⁶⁶

The *Denver Consortium* Court also touched on the notion that economically burdensome cable regulations like those mentioned above may have a chilling effect on the programming MSOs choose to provide. The Supreme Court stated, "[T]he added costs and burdens that these requirements impose upon a cable system operator may encourage that operator to ban programming that the operator

164. 518 U.S. 727, 754 (1996).

165. See *id.*

166. See *Playboy II*, 945 F.Supp. at 778.

would otherwise permit to run, even if only late at night."¹⁶⁷ Likewise, it is not difficult to predict that if some MSOs find compliance with section 505(a) to be too expensive, and that compliance with section 505(b) will result in a decrease in revenue, choosing to stop carrying any sexually explicit channels is the logical outcome. Section 505 then, in effect, would act to deprive all adults of such programming, simply because an unidentified number of children may or may not have been exposed to the signal bleed of such programming. As one commentator analogized the situation, "the state demands that children ride in car seats, but it does not require auto manufacturers to equip every car with such seats on the chance that a child might be a passenger."¹⁶⁸ Section 505, therefore, does not appear to be the most narrowly tailored means for protecting children from adult programming.

B. Less Restrictive Means

Less restrictive alternatives discussed in *Denver Consortium* parallel the alternatives to section 505. Section 544(d) of the 1984 Cable Act (requiring MSOs to provide lockboxes upon request) was characterized by the Government in *Denver Consortium* as less effective than programming regulations because it requires parents to discover that the lockboxes exist, learn how to obtain one from their MSO, and then spend time learning how to use it.¹⁶⁹ While the Supreme Court admitted to having to "assume the accuracy" of the Government's statement, it went on to suggest that certain provisions in the Telecommunications Act of 1996 may better deal with the 1984 provision's ineffectiveness than the provision it struck down in *Denver Consortium*.¹⁷⁰

Of course, the two provisions from the Telecommunications Act of 1996 the Supreme Court referred

167. *Denver Consortium*, 518 U.S. at 754.

168. James R. Petersen, *Scrambled: The Supreme Court Got Its Signals Crossed*, PLAYBOY, Nov. 1997, at 51. Incidentally, it was this article that inspired the topic of this note.

169. See 518 U.S. at 758-59.

170. See *id.*

to were sections 504 and 505.¹⁷¹ However, while the Court was quick to point out that that sections 504 and 505 were less restrictive than the provision at issue in *Denver Consortium*, it also stated that the constitutionality of sections 504 and 505 was not before it.¹⁷²

As for section 504, it is definitely less restrictive than section 505, and theoretically could be the means to meet the Government's compelling interest in protecting children from signal bleed of sexually explicit programming. Criticisms of section 504 are no more strongly supported than those of section 505. The *Playboy II* court's worry about section 504 not being effective because a child could view the unblocked signal bleed at a neighbor's house is easily defeated by the proposal that the same friend's parents might actually subscribe to the channel, meaning the children would be no more protected from the adult programming by section 505(a) as it would section 504.¹⁷³ Indeed, similar arguments can be made against the time channeling requirement of section 505(b), in that children would be free to view all the signal bleed they desire if they are capable of staying up past 10:00 p.m., which is not an outlandish proposal in modern day society.¹⁷⁴

Furthermore, the argument made by the *Playboy II* court that section 504 is "an adjunct of lesser efficacy" because it requires parents to take affirmative steps to block the signal bleed is not very forceful. First, while the *Playboy II* court faults MSOs and adult channel programmers for their lack of advertising of the section 504 free voluntary blockage, nowhere in the provision does it assign such duties to those parties.¹⁷⁵ Second, it seems unreasonable for the court to

171. See *id.* at 756.

172. See *id.*

173. Stephen R. Effros, *Content Regulation: Broadcast Signal Carriage and Obscenity/Indecency—A Year of Preliminary Skirmishes Leading Up to the Final Rounds*, 470 PLI/PAT 7, 15, (1997).

174. It is not hard to imagine that in households where children have televisions in their own bedrooms, or where parents work late or otherwise leave their children unsupervised after 10 p.m., a child could still access the signal bleed, even if the MSO was in compliance with section 505(b).

175. See Pub.L. No. 104-104, § 504, 110 Stat. 56, 136 (1996).

expect evidence to be presented on the effectiveness of section 504 when that provision came into effect only as recently as the rest of the Telecommunications Act of 1996.¹⁷⁶

Finally, it is not nearly as clear as the court implies in *Playboy II* that section 504 would not be a worthy alternative to section 505. For example, the effort put forth by the parents who sent letters to their congressmen complaining about signal bleed could easily be channeled toward their own MSOs in order to request a free lockbox installation. In such an instance, both the parents would be satisfied in protecting their children, and the MSOs and programmers would be satisfied in only having to finance the blockage for those who affirmatively desire it. Also, since the parents must have contacted the MSO initially in order to subscribe to cable in the first place, it does not seem unreasonable to have them contact the MSO to address a perceived problem with their service.

In *Playboy II*, the court acknowledged that cable subscribers could be notified of the services available proscribed under section 504 via inserts in program guides, messages on monthly billing statements, advertisements on other channels, and special mailings.¹⁷⁷ Yet, because no evidence was presented of such notifications being made or consumer response to them, the court concluded that section 504 could not be considered "a meaningful alternative" to section 505.¹⁷⁸ However, in what can be interpreted as a pinhole to exploit, *Playboy II* did state that "[a]t the time of the permanent injunction hearing, further evidence of the actual and predicted impact and efficacy of § 504 would be helpful to us."¹⁷⁹

C. Common Sense Considerations

Perhaps the best accomplishment section of 505 makes is illustrating just how irresponsible Senators can be in attempting to appease their constituents. During her remarks

176. *See id.*

177. *See* 945 F.Supp. at 781.

178. *Id.*

179. *Id.*

introducing the amendment that became section 505, Senator Feinstein was quick to announce that "there are no uniform laws or regulations that govern such sexually explicit adult programming on cable television."¹⁸⁰ While she did mention that both the National Cable Television Association and the California Cable Television Association had adopted voluntary guidelines that recommended that local MSOs fully block unwanted sexually explicit channels at no cost to the consumer,¹⁸¹ she failed to acknowledge section 544(d)(2) of the 1984 Cable Act, which actually codifies as federal law those voluntary guidelines.¹⁸² Perhaps the Senate has no qualms about passing redundant laws, but when those laws raise potential violations of constitutional rights, the courts should not ignore such actions.

Another element to consider in examining the Congress' poor judgment in passing section 505 is whether or not spending resources on the enforcement of such a law is realistic. With the development and implementation of new technologies, the phenomenon of signal bleed will soon become non-existent. An example of such technology is the direct broadcast satellite, which is not subject to section 505 or similar regulation.¹⁸³ Direct broadcast satellite systems include such services as DirecTV, PrimeStar, and EchoStar Communications.¹⁸⁴ MSOs lost over five percent of their subscribers to such systems in 1996 alone.¹⁸⁵

Since direct satellite broadcast systems are not subject to the regulation imposed by section 505, the effectiveness of the statute in preventing children from being exposed to sexually explicit programming is diminished. For example, a household that subscribes to an MSO that complies with section 505 will not subject its children to the signal bleed of sexually explicit channels. However, those children would be able to view the same sexually explicit programming at their

180. 141 CONG. REC. at S8167 (1995).

181. *See id.*

182. *See supra* Part II.C.

183. *See* Goldblatt, *supra* note 12, at 264.

184. *See* BIEDERMAN, *supra* note 26, at 631.

185. *See* HOLLYWOOD REPORTER, Dec. 23, 1996, at 3.

friends' home, if that household received direct broadcast satellite service instead of cable. DirecTV, DISH Network, and Primestar all have Playboy Television available 24 hours per day, in addition to pay-per-view services and 24 hour availability through the Galaxy 5, Transponder 2 of traditional C-Band satellite dish service.¹⁸⁶

Currently, MSOs are also experimenting with new digital cable service, an advanced technology that improves picture and sound quality, as well as eliminates signal bleed.¹⁸⁷ The *Playboy II* court noted that approximately 2 million households already receive such service, and that MSOs will most likely make the premium channels the first channels they switch over to digital cable.¹⁸⁸ Upgrading traditional coaxial cable to hybrid fiber-optic coaxial cable is estimated to cost MSOs collectively close to \$25 billion.¹⁸⁹ While such expenditures make the money needed to comply with section 505 look like peanuts, it appears that forcing MSOs to comply with section 505 will result in throwing money away. MSOs will eliminate signal bleed when they switch to digital cable service, and there is very little doubt that they will switch, as it will be necessary for them to do so in order to compete with the Direct Broadcast Satellite Systems and the entry of telephone companies into the cable television market.¹⁹⁰ So, perhaps Congress simply needed to be a bit more patient, as it is apparent that signal bleed is a problem that will correct itself in the not too distant future.

Lastly, there is also something to be said for allowing signal bleed to remain unregulated for the good of society. In his dissent in *Pacifica*, Justice Brennan wrote the following:

As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven 'dirty words' healthy,

186. See *I Want My Playboy TV*, available at <http://www.playboy.com/entertainment/pbtv/sat_info/index.html>, (last visited June 14, 1999).

187. See *id.*

188. See *Playboy II*, 945 F.Supp. at 780.

189. See Elizabeth Lesly, *Cable TV: A Crisis Looms*, BUSINESS WEEK, Oct. 14, 1996, at 101.

190. See *id.*

and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that.¹⁹¹

While there is arguably a dramatic contrast between allowing a child to listen to a monologue about dirty words, and allowing a child to watch sexually explicit adult programming, at some level there is a common theme shared by both practices. Parents who wish to break down traditional taboos associated with sexuality may not be so opposed to allowing signal bleed to go unregulated. If anything, the existence of signal bleed allows children of cable subscribers to experience the rite of passage that generations of children before them have experienced in the form of discovering their sexuality through covert exposure to sexually explicit literature, magazines, and videos. While Justice Brennan may not have wished to have his reasoning extended to such an extreme, the notion is worth considering when such parental prerogatives are threatened by potentially unconstitutional regulations.

V

Conclusion

Ultimately, section 505 should be found unconstitutional. While the court in *Playboy II* found that the merits of such an argument were unlikely to succeed, it is the reasoning found in *Playboy I* that indicates the legislation may be found unconstitutional.

While the Supreme Court may have affirmed *Playboy II* without hearing the merits of the case, there is little doubt that a true facial challenge to the constitutionality of section 505 will be brought in the near future. When that day comes, hopefully the Court will find that there are less restrictive ways than section 505 to protect children from the signal

191. *Pacifica*, 438 U.S. at 770 (Brennan, J., dissenting) (footnote omitted).

bleed of sexually explicit adult programs. Only then will section 505 finally be struck down as unconstitutional.